Supreme Court U.S.
FILED
JUL 12 1993
OFFICE OF THE CLERK

No. 92-1982

In The

Supreme Court of the United States

October Term, 1993

HILLCREST MEDICAL CENTER,

Petitioner,

v.

RONDA SCRIBNER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 12, 1993

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QUESTIONS PRESENTED

1. Whether the judgment of the trial court upholding a punitive damage jury verdict, which was then conditionally upheld by the Oklahoma Court of Appeals upon remittitur by Respondent of $5,000,000 to which Respondent has agreed, satisfies the requisites of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether Petitioner was afforded procedural due process of law.

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JURISDICTION

The Respondent agrees that this court's only jurisdiction would be under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has raised only the Fourteenth Amendment to the United States Constitution, and only the following language therefrom:

> No State shall * * * deprive any person of * * * property without due process of law * * * .
>
> U.S. Const. amend. XIV

Although Petitioner has cited the Oklahoma statute on punitive damages, it has not argued that such statute violates any provision of the United States Constitution. Oklahoma's punitive damages statute is found at Okla. Stat. tit. 23, § 9(A) (1987):

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

STATEMENT

The Petitioner in this case is seeking this Court's review after having received a fair trial by jury in an Oklahoma trial court and substantive appellate review in the Oklahoma Supreme Court resulting in the benefit to Petitioner of a five-million-dollar ($5,000,000.00) remittitur. It is Petitioner who sought remittitur as a remedy in the Oklahoma Supreme Court. Having received the remedy it sought, Petitioner's complaint now seems to be that the remittitur was not as large as Petitioner would like it to be.

On October 1, 1985 Respondent, Ronda Scribner, was admitted to Petitioner, Hillcrest Medical Center, for a full abdominal hysterectomy with bilateral salpingo-oophorectomy. On October 2, 1985, within twenty-two (22) hours of this major surgery, Respondent was mistaken for another patient and wrenched from her hospital bed, despite her protests, to begin an ultrasound treatment that was not ordered for her. This assault and battery by Petitioner's employees caused Respondent's suture from her hysterectomy to rupture and tear which eventually led to a wound dehiscence and an incisional hernia, a life-threatening condition. The injury to Respondent was not the result of one single mistake, but the result of a pervasively reckless system of patient care which Petitioner condones and encourages.

Respondent had a difficult and painful first hospital stay which was longer than usual for a hysterectomy. The difficulty was caused by the undiagnosed tear in Respondent's suture caused by Petitioner's reckless acts. Respondent was then forced to undergo a second surgical

procedure to repair her incisional hernia which required general anesthetic, along with a subsequent hospital stay. Respondent was then billed by Petitioner for the extra hospital stays and medical treatment caused by Petitioner's recklessness.

Petitioner's employees testified that at the time of the assault and battery upon Respondent in 1985, they were unfamiliar with Petitioner's own procedural rules for identifying and locating patients.

Five years later, at the trial of this case in 1990, Petitioner had still failed to adequately train its employees on proper identification of patients and patient tracking. Petitioner's orderly who actually grabbed Respondent despite her protests, testified that he was still not familiar with Petitioner's rules for orderlies to follow in patient identification. The orderly's supervisor testified that such rules did not apply to his department.

Witnesses sponsored by both parties testified that the acts of negligence and/or assault and battery by Petitioner's employees evinced a reckless or wanton disregard for the rights of Respondent. (Transcript pp. 157-160, 177-178, 298). The trial court made a finding on the record, outside the presence of the jury, that there was clear and convincing evidence upon which reasonable men and women would not differ that the conduct of Petitioner was a reckless or wanton disregard of Petitioner's rights. Pursuant to Oklahoma's punitive damage statute, the trial court lifted the statutory "cap" on punitive damages. The jury returned a verdict for Respondent

in the amount of $100,000.00 in actual compensatory damages and $10,000,000.00 in punitive damages.

Petitioner appealed the judgment and also filed a motion to vacate the punitive damage portion of the judgment and asked for a remittitur. The trial court overruled Petitioner's motion and Petitioner appealed this ruling to the Oklahoma Supreme Court asking for a reversal as to punitive damages or, again, a remittitur. The Oklahoma Supreme Court consolidated the two appeals and referred the case to the Oklahoma Court of Appeals which affirmed the judgment of the trial court on condition that Respondent agree to a remittitur of $5,000,000.00. Respondent filed her acceptance of the remittitur with the Court of Appeals. Petitioner then petitioned the Oklahoma Supreme Court for certiorari seeking a reversal as to punitive damages or a larger remittitur. The Oklahoma Supreme Court denied certiorari.

Petitioner now complains that the remedy of remittitur that it sought and was given is not large enough. Respondent seeks to be able to dictate to the Oklahoma Supreme Court the amount which the remittitur should be. In effect, Petitioner seeks to be able to reduce the punitive damages awarded in this case to an amount that is not punitive to Petitioner at all.

A. Trial Proceedings

The strength of the judgment in this case and the inherent weakness of Petitioner's arguments both rest on the pervasively reckless or wanton attitude, actions and demeanor of Petitioner, and its agents, servants and

employees. (Transcript, pp. 277-288). Petitioner, to this day, stubbornly refuses to see that its actions with respect to Respondent were in reckless or wanton disregard of her rights.

Respondent, a human being, who had placed herself in the fiduciary care of Petitioner and its employees, was dragged about within Petitioner hospital with less care about her identity than had she been an animal in a veterinary clinic. For Petitioner to take the mule-like position that such conduct is not reckless requires nothing short of the punitive damages affirmed in this case.

The undisputed facts speak for themselves. Even though Respondent's name was clearly and unambiguously emblazoned in bold black letters over her bed, an orderly recklessly disregarded that information and wrenched Respondent from her bed within 22 hours of having her abdomen surgically opened from hip bone to hip bone. Even though Respondent's name was clearly and unambiguously written on her hospital-provided armband, this same orderly recklessly disregarded that information. Even though Respondent raised a protest about whether she should have an ultrasound test, this same orderly recklessly disregarded her entreaties.

If this conduct was not reckless enough, this same orderly cared so little about the identity of the patient he was dragging around the hospital, he did not even bother to ask Respondent her name. (Transcript pp. 125-131)

But, the orderly's reckless actions did not stand alone. He was aided and abetted by the two shifts of nursing staff, an ultrasound technician, the supervisor of ultrasound, and Petitioner itself.

The orderly and his supervisor were unfamiliar with Petitioner's rules and regulations regarding proper identification and location of patients. Petitioner did not bother to educate them. In fact, the supervisor and his personnel testified that such rules did not apply to the orderly's department. (Transcript, pp. 169-170, 262-263). At trial, five years *after* Respondent had been misidentified and injured by the orderly, Petitioner had still not bothered to train its orderly on proper identification and location of patients.

The pervasively reckless conduct of the Petitioner's personnel continued when the ultrasound technician, to whom the orderly delivered Respondent, also recklessly disregarded the name on Respondent's armband. The ultrasound technician recklessly failed to address Respondent by name before the technician began to fill Respondent's bladder with half of a quart of cold water. (Transcript p. 186)

Petitioner had promulgated its own "Patient Bill of Rights," which stated that a patient had a right to have the necessity of any procedure explained to her by her doctor before that procedure. Plaintiff's Trial Exhibit 2. When Respondent questioned the necessity for the ultrasound procedure with the orderly, he recklessly dismissed her concerns. (Transcript pp. 130-131). When Respondent questioned the necessity for the ultrasound procedure with the ultrasound technician, her pleas were recklessly dismissed again. When the ultrasound technician saw Respondent's surgical incision and called the nurses' station, Respondent heard the technician use the name of the lost patient. The Respondent protested that the name the ultrasound technician used on the phone

call to the nurses' station was not her name. It was only then that the ultrasound technician cared enough to find out Respondent's name.

Of course, the reason Respondent was placed at jeopardy in the first place was because Petitioner had misplaced *another* patient. This was the patient who was actually supposed to have the ultrasound test. This lost patient was moved from bed 10613 A in Respondent's room to some other room. (Video Deposition of Ann Tomlinson, March 7, 1990, pp. 85-7) (Transcript pp. 120-121). Respondent was in bed 10613 B. When the orderly went in to room 10613 he saw that bed A was empty. Bed A was where the lost patient was supposed to be. Instead of finding out where the lost patient had gone, he recklessly went to the next bed, bed B, and grabbed Respondent. This orderly testified that such conduct was not reckless and he saw no risk in it. (Transcript p. 127).

Two shifts of nurses failed to note the room change in the records of the lost patient which had been in bed 10613 A, in flagrant violation of Petitioner's regulations and the ordinary standard of care. (Tomlinson Video Depo., March 7, 1990, p. 94; Transcript, p. 119; plaintiff's trial exhibit 12). The nurses know that this is dangerous. (Tomlinson Video Depo. March 7, 1990, pp. 107-109). The nurse in charge of the lost patient directed the orderly to the wrong room, according to the orderly, even though that nurse had just placed a foley catheter in the lost patient in her new room. (Transcript, p. 121; Tomlinson Depo., pp. 118-119).

The ultrasound technician failed to obey her supervisor and inform Respondent's nurse that Respondent

had been wrongfully taken to an ultrasound procedure. (Tomlinson Video Depo., March 7, 1990, p. 37). This technician only noted the incident in Respondent's record after Respondent's doctor had found out what happened and had angrily confronted Respondent's nurse. (Transcript p. 202).

Respondent never felt well after her excruciating experience in being assaulted without cause by Petitioner's personnel. After a longer than usual hospital stay for such a hysterectomy, Respondent was sent home in obvious distress. When she was finally forced to return to the hospital because her intestines were protruding from her body, she was again placed under general anesthetic and her incisional hernia was repaired by a second surgery. To add insult to the injury that Petitioner had caused, Petitioner billed Respondent for the second surgery and the extra days of hospital stay on the first surgery. (Plaintiff's Trial Exhibit 10)

Respondent's testimony as to what happened to her in the hospital was unrefuted and was in fact admitted by Petitioner. Petitioner only disputed that it's actions caused Respondent's wound dehiscence and subsequent incisional hernia. Petitioner claimed it should not be held liable for making an "honest mistake." (Transcript, p. 705).

At the close of the evidence, the trial court, pursuant to Oklahoma law, made a finding on the record, outside the presence of the jury, that there was clear and convincing evidence that Petitioner's conduct evinced a reckless or wanton disregard for the rights of the Respondent.

> * * * I find that the evidence is clear and convincing and at (sic) that the conclusion is unmistakable and free from any substantial doubt that there was a lackadaisical attitude towards handling the check procedures for the purpose of identifying a patient so that the institution could make certain that the proper procedures were performed on the proper patient. And on that basis I will submit the issue of punitive and exemplary damages and I will remove the statutory lid of actual damages under 23 OS 9.
>
> * * *
>
> * * * And I believe that the – it would be a reckless and wanton disregard. And it would be – I would conclude that the lackadaisical attitude would create a reckless and wanton disregard of the rights of the patient.

(Transcript pp. 603 & 605).

Respondent's out of pocket damages for medical bills and lost wages were at least $4,367.26, including $1,651.00 for the extra days in the first hospital stay, $2,093.03 for the second hospital stay, and $623.23 for lost wages. (Transcript p. 697).

B. Review by the Trial Court

Petitioner did not file a motion for new trial, but instead filed a "Term Time Motion To Vacate Award of Punitive Damages" (Term Time Motion). During the pendency of this motion, the Petitioner filed its appeal of the trial court's judgment.

The trial court ruled on the Petitioner's Term Time Motion after considering Respondent's Response to the Term Time Motion and Petitioner's Reply to Respondent's Response. Among other arguments, the Petitioner raised objections to the punitive damage award citing provisions of the state and federal constitutions as authority. Petitioner asked for remittitur as a remedy. Petitioner claims the trial court failed to "examine whether the jury's award was so excessive as to violate substantive due process." Contrary to that assertion by Petitioner, the trial court found that its judgment did not violate any provision of the Oklahoma or United States Constitutions. The trial court's "Order Overruling Defendant's Term Time Motion To Vacate Award Of Punitive Damages" was filed on October 11, 1990. The Petitioner then filed another petition in error with the Oklahoma Supreme Court concerning this order.

C. Review by the Court of Appeals

On appeal to the Oklahoma Supreme Court, both the appeal of the trial court judgment and the appeal of the denial of the Term Time Motion were consolidated and sent to the Oklahoma Court of Appeals for review. Both of these appeals included requests for remittitur by the Petitioner. The Oklahoma Court of Appeals concluded, among other things, that no provisions of the federal or state constitutions were violated by the punitive damage judgment. The Court of Appeals then affirmed the trial court's $10,000,000 punitive damage judgment on condition that the Respondent agree to a remittitur of $5,000,000. Respondent agreed to the remittitur in writing filed with the Court of Appeals.

Even though the Petitioner had been granted the remedy of remittitur for which it had asked (although, not in the amount for which it had asked), the Petitioner still sought review of the Court of Appeals opinion by the Oklahoma Supreme Court by way of writ of certiorari. The Oklahoma Supreme Court denied certiorari.

NO REASON FOR CERTIORARI

The Petitioner has articulated no sound reason why this Court should grant certiorari in this case. The paramount reason for this Court denying certiorari is that Petitioner has claimed it has been deprived of due process, yet it has been given the benefit of the very process for which it asked. Petitioner has benefitted by the legal process of the Oklahoma appellate review by exactly the remedy it invoked – remittitur. Petitioner's only concern is that it was not afforded the *amount* of remittitur which it wanted. Petitioner's position flies in the face of the entire body of law concerning punitive damages. If Petitioner, guilty of acts justifying punitive damages, is allowed to prescribe the amount of punitive damages to be assessed against it, those damages will never be punitive.

Petitioner is squealing like a "stuck pig," because the punitive damage judgment in this case hurts. Petitioner has missed the point. Punitive damages are supposed to hurt, and they are supposed to hurt a defendant more than the defendant thought it could be hurt. Unpredictability is the essence of punitive damages.

Predictable punitive damages would no longer be actually punitive. This is because a defendant could then calculate his risk for errant conduct beforehand to ascertain when such conduct would be cost-beneficial. If punitive damages are ever cost-beneficial, they are no longer actually punitive.

This Court has just decided the case of *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (1993). In this Court's considered opinion, the procedure by which punitive damages should be awarded is decided by and should remain with the individual States. Even JUSTICE O'CONNOR in her *TXO* dissent agreed that:

> * * * although it might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to "experiment with different methods" of ferreting out impermissible awards "and to adjust these methods over time."
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766, 4777 (1993)

The *TXO* plurality found that punitive damage judgments which have run the gamut of fair jury trial through a state's appellate process are entitled to a very high degree of presumption that such judgments are sound.

> * * * The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was

> reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, see Haslip, 499 U.S., at 24-40 (SCALIA, J., concurring in judgment), or virtually so, id., at 40-42 (KENNEDY, J., concurring in judgment).
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. at 4769.

In a concurring opinion, JUSTICE SCALIA and JUSTICE THOMAS echoed this sentiment in more definite terms:

> The jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the West Virginia Supreme Court of Appeals. Traditional American practice governing the imposition of punitive damages requires no more.
>
> *TXO Production Corp.*, 61 U.S.L.W. at 4773.

In the case at bar, the Petitioner got a fair jury trial, review by the trial court of the punitive damage award, review by the Court of Appeals, remittitur by the Court of Appeals, and denial of certiorari by the Oklahoma Supreme Court. Petitioner has run the gamut of process which was its due in the Oklahoma courts and has greatly benefitted from the run. Taking this Court's words to heart, the presumption that such a judgment is valid

should be virtually irrebuttable. Petitioner has offered no reason for rebutting the presumption other than the punitive damage judgment, as subject to remittitur, is still too large.

A. Large Punitive Damage Judgments

This Court has now made clear that the ratio between compensatory damages and punitive damages is never dispositive of whether a punitive damage award is violative of due process.

> Thus, both State Supreme Court and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the potential for harm that the defendants conduct would have caused . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. at 4770.

However, such a ratio is the basis for Petitioner's complaint that the punitive damage judgment in this case is too large. (Petitioner's Brief pp. 3, 9(n. 8), 12, 16, 26). Even so, the ratio between punitive damages and actual damages was only 100 to 1 before remittitur, whereas the ratio in *TXO* was 526 to 1. After remittitur, the ratio in this case is in the neighborhood of 50 to 1.

Petitioner never touches on the harm and potential harm which its conduct caused the Respondent or might cause others in the future. Petitioner does not want to

talk about this because Petitioner's conduct physically injured Respondent and placed her in a life-threatening situation. Petitioner's conduct forced Respondent to submit to the risk of general anesthetic and additional surgery. After injuring Respondent and the surgery required to repair the injury, Petitioner callously billed Respondent for the trouble.

Worse yet, Petitioner had still not trained the same personnel which misidentified and injured Respondent in the proper procedures for patient identification by the time of the jury trial of this case, five years later. The potential for harm to others in a hospital which stubbornly refuses to properly train personnel in proper patient identification procedures is catastrophic. Petitioner argues that there was no evidence at trial that any other patients had been misidentified, yet it glosses over the fact that the patient for whom Respondent was mistaken, was herself lost in the reckless patient identification and location system condoned and encouraged by Petitioner.

The *TXO* dissent by JUSTICE O'CONNOR expressed surprise at the size of the *TXO* punitive damage award because it did not involve serious personal injury, implying that such a large punitive damage award that did involve personal injury would not be particularly surprising.

> A comparison of this award and prior ones in West Virginia confirms its unusual nature: It is 20 times larger than the highest punitive damages award ever upheld in West Virginia history for any misconduct. * * * That figure is particularly surprising if one considers the nature of

> the offense at issue. This is not a case involving grave physical injury imposed upon a helpless citizen by a callous malefactor. Rather, it is a business dispute between two companies in the oil and gas industry.
>
> *TXO Production Corp.*, 61 U.S.L.W. at 4776-7.

In the case at bar, Respondent was a helpless citizen who did suffer grave personal injury at the hands of a callous malefactor. Petitioner, the malefactor in this case, is so callous that it wants to characterize its actions as "honest mistakes." Petitioner has argued that it should not be held liable at all for these "honest mistakes."

PROCEDURAL DUE PROCESS

In light of this Court's decision in the *TXO* case that a virtual irrebuttable presumption of validity attaches to a punitive damage judgment which has been through a fair trial and has completed state appellate court review, Petitioner's argument that the Oklahoma procedure on punitive damages and the appellate review thereof is constitutionally infirm has no basis in fact or law.

A. Jury Instruction

The jury instruction given in the case at bar on punitive damages was substantially similar to that given by the trial court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1037 n.1 (1991). This Court determined such an instruction did not violate any provisions of the United States Constitution. Additionally, the instruction in the case at bar was given to the jury only after the trial

court found by a clear and convincing burden of proof, that there was sufficient evidence that Petitioner's conduct evinced a reckless or wanton disregard of Respondent's rights. This is an additional procedural safeguard for defendants under Oklahoma's punitive damages statute as applied in this case.

B. Wealth of Petitioner

This Court has determined that the admission of evidence of a defendant's wealth in a punitive damages lawsuit does not violate any provision of the United States Constitution.

> * * * We note, however, that in Haslip we referred to the "financial position" of the defendant as one factor that could be taken into account in assessing punitive damages, see n. 28, supra.

TXO Production Corp., 61 U.S.L.W. at 4771.

Therefore, the evidence of the Petitioner's net worth which was admitted at trial did not violate any provision of the Constitution of the United States.

C. The Trial Court and the Oklahoma Court of Appeals Conducted Meaningful Review

Post trial, the trial court, after considering the extensive briefs of both parties on the issue of the amount of the jury's verdict in this case, issued its "Order Overruling Defendant's Term Time Motion To Vacate Award Of Punitive Damages." This order expressly found no violation of the state or federal constitutions. Petitioner has

criticized the trial court for failing to articulate its reasons for upholding the verdict, however, the *TXO* plurality clearly puts this argument to rest.

> * * * While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.

TXO Production Corp., 61 U.S.L.W. at 4772.

Therefore, Petitioner's argument as to the trial court's review has no basis in law.

For the Petitioner to then argue that the review by the Court of Appeals was not meaningful is patently absurd. The Court of Appeals granted Petitioner's request for a remittitur. The Court of Appeals determined the remittitur should be in the amount of $5,000,000. If a $5,000,000 remittitur is not meaningful to Petitioner, then the remaining punitive damage award after remittitur, should likewise be of little meaning to the Petitioner. As such, the remaining punitive damage award cannot violate any right which Petitioner claims under the United States Constitution.

———— ♦ ————

REPREHENSIBLE BEHAVIOR

Petitioner has asserted in its Petition that its actions carried a "relatively low degree of 'reprehensibility'." Petition for Writ of Certiorari, p. 17. However, it is difficult to imagine more reprehensible conduct which reflects a more callous attitude than the Petitioner refusing to train its employees in proper patient identification procedures. Petitioner's callous and reckless attitude toward patient identification inevitably is magnified through the day-to-day activities of its ill-trained staff. The nightmarish conclusion of such reckless conduct is exactly the scenario which was before the jury in this case – Petitioner performed procedures on the wrong patient. Fortunately, Respondent survived. The next patient may not be so fortunate. There is no doubt that given Petitioner's non-existent identification procedures and Petitioner's assertions that this event was of little consequence, that such occurrences are the antithesis of a rarity - they are routine.

Petitioner must be taught that this conduct does not amount to "honest mistake" or a "low degree of reprehensibility." For the public's sake, Petitioner must learn that its conduct is intolerable in a civilized society. Petitioner must learn that its conduct in the case at bar is more reprehensible and presents a greater potential for harm if left unchecked than the conduct between two oil companies dealing at arm's length on an oil deal. *See TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (1993).

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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